

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED
MAY 07 2015
[Signature]

RICHARD LITSCHIEWSKI,

Plaintiff,

vs.

ROBERT DOOLEY, Warden and
MARTY JACKLEY, State of South
Dakota Attorney General;

Defendants.

1:15-CV-01017-CBK

OPINION AND ORDER DENYING
CERTIFICATE OF APPEALABILITY

TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

This Court dismissed petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the basis that he had twice before challenged his 1997 convictions and sentences and had failed to obtain an order from the Eighth Circuit authorizing a second or successive petition as required by 28 U.S.C. § 2244(b). Petitioner filed a notice of appeal and a request for a certificate of appealability.

Pursuant to 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard . . . Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either

that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000) (emphasis supplied). Petitioner did not and has not made a substantial showing that jurists of reason would find it debatable whether this matter was correctly dismissed for failure obtain permission to file a second or successive petition.

IT IS HEREBY CERTIFIED that there does not exist probable cause of an appealable issue with respect to the Court's order denying petitioner's petition for a writ of habeas corpus. Petitioner's application for a certificate of appealability, Doc. 13, is denied. This in no way hampers the petitioner's ability to request issuance of the certificate by a circuit judge pursuant to Fed. R. App. P. 22.

DATED this 7th day of May, 2015.

BY THE COURT:


CHARLES B. KORNMANN
United States District Judge